SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ of Certiorari	10
Conclusion	20

DECISIONS

AFL v. NLRB, 308 U. S. 401 (1940)	13
Fitrol Corp., 74 NLRB 1307	15
Herboth Tractor Co., 79 NLRB 431	15
Lift Trucks, Inc., 75 NLRB 998	11
Mengel Co., 80 NLRB 705	11
NLRB v. Aldora Mills, CA 5, 1952 F(2d); 30 LLRM 2269	17, 18, 19
NLRB v. Geraldine Novelty Co., 173 F(2d) 14 (CA 2, 1949)	11
NLRB v. Vulcan Forging Co., 188 F(2d) 927 (CA 6, 1951)	12, 16, 17

Page

Pittsburgh P. Glass Co. v. NLRB, 313 U. S. 146 (1941) 13

Puritan Ice Co., 74 NLRB 1311 15

Sanson Hosiery Mills, Inc., 84 NLRB 654 6

Schaeffer Body, Inc., 78 NLRB 1247 15

Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951) 17

STATUTES

29 U. S. C., Sec. 159(a) 16

29 U. S. C., Sec. 159(e) 11, 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

SANSON HOSIERY MILLS, INC.,
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the 5th Circuit.

OPINION BELOW

The opinion of the Court below was issued on April 10, 1952. It is reported in 195 F(2d) 350 and appears in the transcript of record page 99.

JURISDICTION

Judgment was entered in the present case on April 10, 1952. A Petition for Rehearing was timely presented and denied on May 10, 1952. This Petition is presented within ninety (90) days from the date of denial of the Petition for Rehearing.

Jurisdiction is invoked under Section 1254 of the Judicial Code, 28 USC Section 1254.

STATUTES INVOLVED

29 U. S. C. 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

29 U. S. C. 159(c) (3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period a valid election shall have been held. * * *

29 U. S. C. 159.(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 158(a) (3) of this title, of a petition alleging

they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer. * * *

29 U. S. C. 159.(e)(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice for an employer to refuse to bargain with the union which has, after the passage of a year and a half from the time of the election, admittedly lost its majority, whose contract has been properly terminated, and where a majority of employees in the unit have filed a decertification petition with the National Labor Relations Board.

2. Whether an employer must continue to bargain with a union unless and until the National Labor Relations Board formally decertifies the union as bargaining representative, even though the union admittedly lost its majority to a rival group almost five years prior to the Court's Order of Enforcement, and despite the fact the union's collective bargaining contract has been properly terminated under local law.

3. Whether the Board may continue in force a collective bargaining contact of indefinite duration for a period of two years, although under local law the contract is terminable at will and has been properly terminated by the employer.

STATEMENT OF THE CASE

Petitioner is a women's hosiery manufacturer, with its plant located at Meridian, Mississippi. On November 19, 1947, after an election held by Respondent among its employees on February 7, 1947, and certification by Respondent on May 2, 1947, a collective bargaining agreement was signed by the United Textile Workers of America, A. F. L. and Petitioner. This agreement contained no provision setting forth a definite period of time during which it was to continue in force.

On November 17, 1948, almost a year later, Petitioner was informed that a decertification petition was being filed with the Board by a group of its employees representing a majority of Petitioner's workers. On the same day, Petitioner, through its attorney, wrote the union as follows:

> "Representatives of Artcraft Hosiery Company at Meridian, Mississippi have been informed that a petition for decertification is going to be filed on behalf of a group of our employees. You will, I assume, be notified in due course of this fact by the Regional Office of the National Labor Relations Board at New Orleans.
>
> "In view of the pendency of the decertification proceedings, the company regards its present collective bargaining agreement dated November 19, 1947 with the United Textile Workers of America, A. F. of L., and Local Union No. 171 as terminated as of November 19, 1948."

The union replied to this letter as follows:

"Upon my return to the office I find your letter of November 17th, with reference to the Meridian Division of the Artcraft Hosiery Company.

"I note what you say about the decertification petition, and the attitude of the company with reference to the agreement.

"In checking my files I note that you never replied to my query as to whether the existing agreement would run for two years, in keeping with what I understood was the situation. It would appear that this omission was deliberate.

"I am also advised that the alleged decertification petition is being fomented and promoted by supervision. Inasmuch as you have seen fit to notify us that you desire to terminate the agreement which we had with the Artcraft Hosiery, we are advising you that we presently represent the overwhelming majority of the employees at this plant, and are now demanding that you recognize and deal with us as the collective bargaining agent.

"We desire to negotiate a new agreement, which will include a wage increase, improved vacations, reporting time, paid holidays, and other items.

"Please advise when and where we may meet for the purpose of negotiating such agreement."

Petitioner thereafter on November 29, 1948 wrote the union stating that there had been no understanding with respect to the two-year period and concluded that "with respect to your request for a collective bargaining meeting * * * at such time as we are advised by the National Labor

Relations Board of the disposition of the pending petition, a suitable reply will be furnished you."

It is admitted by the Respondent, that on November 17, 1948 and thereafter, the union did not represent a majority of the employees of Petitioner's plant (R. A. 42a).

On June 28, 1949, the Board issued its decision dismissing the decertification petition. The Board held, that since the contract had no specific term, it was one of indefinite duration, but that nonetheless, under the Board's rules for dealing with contracts of this nature, it would bar reinvestigation of bargaining representatives during the first two years of its existence. Since the decertification petition was filed prior to the two-year period, the Board held that there was no reason to reopen the matter despite the Petitioner's termination of the contract and regardless of the fact that the union admittedly did not represent a majoriy of the employees in the suit. The Board stated that it was of no consequence that the Petitioner's action in cancelling the agreement created uncertainty as to its continuing validity. *Sanson Hosiery Mills, Inc.*, 84 NLRB 654.

After this decision the union on July 2, 1949 sought to resume negotiations with Petitioner, but on July 13, 1949, Petitioner refused to do so expressing its doubt that the union represented a majority of its employees (B. A. 22).

On July 28, 1949, the union filed a charge with the Board alleging a refusal to bargain. Because of this charge and the resulting complaint, then pending, the Board dismissed a new decertification petition filed by the original employee group on March 15, 1950, well after the expiration

of the two-year period previously referred to in the Board's decision.

The Trial Examiner in the present case recommended dismissal of the complaint, holding that the contract was terminable at will by either party, or at least was terminable after reasonable time, and the year which had passed prior to termination was a reasonable time. He, therefore, found that since the contract was properly terminated, it was not a bar to the reopening of the question of the majority status of the union. The Trial Examiner also held that while a majority status is generally presumed to continue, in this case where the certification of the union was one and one-half years old, a decertification petition had been filed by an independent group of employees, and admittedly the union had lost its majority,[1] the presumption of continued majority status was rebutted, and Petitioner properly withdrew recognition of the union.

There is no claim or evidence in the record of this case that Petitioner in any manner caused the loss of the union's majority.

Upon exceptions filed by the General Counsel, the Board reversed its Trial Examiner on the grounds that since the contract was, according to the Board, of indefinite duration it served as a bar to a Petition for two years. Consequently, it held that while the contract was a bar, Petitioner was under an obligation to recognize and bargain

---

[1] The Trial Examiner found that the decertification petition was supported by a majority of Petitioner's employees based on the concession made by the General Counsel. There was never any question in this case that the employees, opposed to the union, have not represented a majority at all relevant times.

with the union despite the admitted loss of its majority, and despite the termination of the contract.

The Chairman of the Board, Paul M. Herzog, dissented from the opinion of the Board on the ground that the union on November 28, 1947, by its letter set forth above had accepted the fact that the contract had been terminated, and hence could not prevent decertification.

Upon the refusal of Petitioner to bargain in accordance with the Board's Order, enforcement proceedings were instituted by the Board.

The Court of Appeals for the 5th Circuit failed to decide the issues in this case—issues which had been litigated before both the Trial Examiner and the Board with respect to whether the Petitioner had properly terminated its contract with the union, and whether, despite that fact, the Petitioner could validly impose its two-year rule on Petitioner, forcing it to continue to bargain with the union which had lost its majority through no fault of Petitioner.

The Court below instead decided the case on grounds which were not briefed or argued by Petitioner or Respondent. The Court held that a certification of the bargaining representative, once made by the Board, must be observed by the employer unless and until the Board itself alters or sets aside the certification, even though, as in the case, the union had lost its majority, and there was an interval of more than a year and a half between the certification and the refusal to bargain. The Court below further took the position that (Transcript pp. 103-104):

> "Any controversy arising over the question of representation would be one between the bargaining

agent and the employees, with which the employer is not concerned. . . .

"If the employees are being unlawfully denied the right to change their bargaining representative, they have recourse to this Court by petition to review the Board's action. The employer cannot vicariously raise the question for them, as it here seeks to do, in justification of its refusal to further negotiate with the duly certified bargaining representative, whose status as such has not been terminated by the Board."

At the time the Court's Order was issued almost five years had passed since the union's certification by the Board.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Court below based its decision on an erroneous interpretation of the Act, one which was never nor is now the law. The Court took the flat position that (Transcript p. 4):

> "Although certification of a bargaining representative by the Board is not intended to create a permanent relationship without regard to new situations that may develop, there must be a reasonable measure of stability to the relationship so established, as it is one of the objectives of the Act to stabilize as well as improve industrial relations. Such a certification, when lawfully made, must be respected by the employer until changed conditions are reflected by a later ruling by the Board altering or setting aside the certification. This is true, even though the bargaining agent so designated has lost its majority representation of the employees by reason of the subsequent defection of some of those originally voting for it as there representative. The existing certification must nevertheless be honored until lawfully rescinded."

It is submitted that the foregoing is not and never was a correct statement of law. Even the Board has not taken the position that certification as such could not be challenged by the employer unless and until the Board itself legally rescinded it. Such a rule would subvert the intention of Congress to provide bargaining agents which actually represent a majority of the employees in the unit. Such a rule would impose large and unnecessary administrative

burdens upon the Board. A certification of a bargaining representative by the Board is merely the finding of a *fact*, as defined by statute, the force of which finding may be deemed to continue for a reasonable time. This "reasonable time" has been construed to mean one year by the Board itself. *Lift Trucks, Inc.*, 75 NLRB 998; *Mengel Co.*, 80 NLRB 705; *NLRB v. Geraldine Novelty Co.*, 173 F(2d) 14 (CCA 2, 1949). After the one year period had expired, certification which was previously virtually conclusive has the force merely of a presumption of a continuing majority which may be rebutted by a showing that the employer has reasonable grounds for believing the union no longer represents a majority. Cf. *Lift Trucks, Inc.*, supra. In the present case the employer at the time of the refusal to bargain had reasonable grounds for believing the union no longer represented a majority in view of the decertification petition signed by a large majority of Petitioner's employees. Refusal to bargain did not take place until eighteen months after certification. There is no case either before the Board or in the Courts of Appeal which holds on such a showing of loss of majority and after the passage of so much time, that an employer must observe the certification until the Board itself legally rescinds it.

It is thus clearly a novel and erroneous view of the Act of the Court below to say that only the Board itself can decertify a bargaining representative. In effect such a theory assumed that under the law an employer is helpless to deal with an existing admitted loss of majority after the certification has been in effect a reasonable time where the loss of majority is not caused by the employer. Congress in Section 9(e)(1)(2) of the Act has formalized the one year certification period of the Act as amended and made

it mandatory upon the Board rather than discretionary. The one-year rule, however, has always existed.

While an employer may not in any way interfere with the status of the union as a bargaining representative, that status depends upon the union continuing its majority after the certification year has expired. The employer or a rival group of employees may, however, ascertain the *fact* of the loss of majority. If the employer has not ascertained that fact correctly, he may be penalized by the Board for failing to bargain. But if the employer is right in ascertaining that the loss of majority has occurred, no penalty should attach to the employer's action in refusing to bargain with a discredited union. That was the situation here. Even though the Court below acknowledges that the majority may have been lost still it insists on the formalization of that fact by a Board finding, although even the Board does not contend that one is necessary under the Act. To hold, as the Court below has done, that an employer is bound by statute to deal with a discredited and unrepresentative bargaining agent unless and until the Board certifies a fact which is obvious to all, goes far beyond the intention of Congress and the policy of the Board itself. *NLRB v. Vulcan Forging Co.*, 188 F(2d) 927 (CA 6, 1951).

The Court below took the position that the employer was not concerned with the question of which bargaining agent represents its employees, but it is submitted that the question of the bargaining agent is of vital concern to the employer. Wages, hours, working conditions, production effort and plant morale all revolve about this issue. If the bargaining agent is unrepresentative and the Board erroneously refused to consider the claims of rival employee groups, the only way such arbitrary refusal can be brought

before a court for review is by the employer's refusal to bargain with the existing union. It is only by means of an unfair parctice proceeding under Section 10 of the Act that a court may review the Board's action in continuing in power a union which has lost the confidence of the majority of its members. There is no means in the Act for direct review of representation proceedings under Section 9. *AFL v. NLRB*, 308 U. S. 401 (1940); *Pittsburgh P. Glass Co. v. NLRB*, 313 U. S. 146 (1941). It is therefore extremely difficult to understand the Court's statement that "if the employees are being unlawfully denied the right to change their bargaining representative, they have recourse to this Court by petition to review the Board's action." Such action is not reviewable by Appellate Courts. Under the Court's opinion Respondent is foreclosed from raising the representation issue before this Court in the only manner it could have been accomplished. As a matter of fact the rival employees group in this case sought to intervene before the Trial Examiner, but intervention was refused on the grounds that the employer could properly raise all relevant issues.

2. The Court below has completely failed to decide the real issues in the present case, namely, whether the contract which was entered into in Mississippi, without a stated term of duration, may be cancelled after reasonable time upon notice, or whether the Board may impose an arbitrary and uniform rule upon the employer that a contract without stated duration must be observed for a two-year period. This two-year period of repose for indefinite contracts must be distinguished from the one-year period of repose resulting from certification of a majority union by the Board. No issue was raised below by Re-

spondent as to the continued force of the Board certification as such. The Court below, however, decided the case on the ground that the force of the election and certification continues virtually forever. Even though the law of the State, where the contract was made, here Mississippi, permits the concellation of the contract when the employer did so, as the Trial Examiner recognized, Respondent has taken the position that it is entitled to completely disregard local law and create a standard two-year period with respect to all contracts which it terms of "indefinite duration". No such power is given the Board by the Act. In fact, Section 9(e)(1)(2), which was amended by Congress in 1951, but which would appear to be applicable to the present case, limits the term of a certification to one year. That Section, in fact, is merely declaratory of existing Board policy. Under the Board's theory, had the contract been expressly for one year, it would have expired by its own terms, and the Board could not have prevented a decertification proceeding, nor could it have prevented the refusal to bargain by Petitioner on the existing facts. However, since the contract had no specific duration and hence, under the law of Mississippi was terminable at will, the Board declares it has the right to treat the contract as one extending for two years and to insist that Petitioner bargain with a discredited union after the labor contract has been terminated, upon penalty of an unfair labor practice proceeding should it fail to do so.

The two-year rule involved in this case, but not passed upon by the Court below, arose out of a situation where an employer signs a long-term agreement with a union which extends for more than two years. The rule has been used principally by the Board to cut down the term of

such long-term contracts by limiting them to two years only. In that manner a rival union which has succeeded in attaining a majority cannot be frozen out indefinitely. Aside from the instant case, the issue has risen in the main where an outside union seeks to replace the existing bargaining representative. *Fitrol Corp.* 74 NLRB 1307; *Puritan Ice Co.*, 74 NLRB 1311; *Schaeffer Body, Inc.*, 78 NLRB 1247; *Herboth Tractor Co.*, 79 NLRB 431. The Board, however, has not until the instant case been faced with the situation where an alleged breach of its two-year rule was treated as an unfair labor practice. While the Board, as a matter of administrative discretion, may have had the right to refuse to entertain a decertification petition for a two-year period in the alleged interest of stability prior to the 1951 amendment to Section 9(e)(1)(2), it is quite another thing to hold, as it has done here, that where an employer refused to bargain with a union, which has lost its majority during that period and the contract has been properly terminated by the employer under local law, an unfair labor practice has been committed.

The Board in erecting its two-year rule into a principle of substantive contract law has attempted to re-write Petitioner's agreement with the union and by doing so has ignored every rule pertaining to interpretation of contracts. In fact, as Respondent has admitted below, it prefers to disregard local contract law completely and substitute uniform administrative rule applicable to all labor contracts.

Local rules of substantive contract law should control a collective bargaining agreement, and the Board should be

bound to follow them. Respondent should not be permitted to impose on parties to a contract terms and conditions not set forth in that contract nor based on common law rules of interpretation. Here the ruling of the Board, which was adopted to cut down the effective duration of long-term contracts where union rivalry is involved, was used in a novel manner by the Board to transform a contract terminable at will into a two-year contract and to protect an admitted minority union during that period. It is submitted that the Court below erred in enforcing the Board's order and imposing upon the Petitioner a contract which it never made.

The Board has the burden of proving that the employer refused to bargain with a union that represented a majority of its employees in order to make out an unfair labor practice. *Vulcan Forging Co.*, supra. The Board in this case conceded that the union did not have a majority at the time of refusal. As a substitute for proof of the majority status of the union, the Board seeks to impose on Petitioner a two-year contract which was never agreed to, and now tries to penalize the Petitioner for not observing this fiat contract. It is submitted that the foregoing position of Respondent is completely inconsistent with Section 9(a) of the Act, which gives the majority of the employees in the appropriate unit the right to select the exclusive representative of the employees. The Board's practice enables a minority to impose its will on the majority of employees over a long period of time. In this case the practice has had the effect for five years of preventing the admitted majority from choosing its representative for bargaining purposes while a discredited minority has been protected by the Board.

It should be here pointed out that the Trial Examiner found in favor of Petitioner, holding that the contract was properly terminated by Petitioner, and that in any event the union had accepted its termination in the letters set forth above. The Board panel divided two to one in this case reversing the Trial Examiner. Chairman Herzog of the Board dissented. The Court below failed to give the findings of the Trial Examiner any weight whatever despite the fact that his report "is as much a part of the record as the complaint or the testimony", and in weighing whether the Board's order is supported by the record considered as a whole, the Trial Examiner's report is an important factor therein. *Universal Camera Corp. v. NLRB*, 340, U. S. 474 (1951).

3. The decision of the Court below is in conflict with *NLRB v. Vulcan Forging Co.*, supra. The instant decision is also diametrically in conflict with a subsequent decision of the Court below, which decision was handed down only a month and a half after the instant case, *NLRB v. Aldora Mills*, — F. (2d) (CA 5, 1952), 30 LLRM 2269. The Court in the present case has taken the flat position in its opinion that a Board certification must be observed by an employer unless and until the Board itself rescinds it, regardless of change of circumstances, including loss of majority, and regardless of the passage of time, here almost five years.

The Court in the *Vulcan* case has taken precisely the opposite position. In that case within one week after the Board certified the union as the bargaining representative, nineteen out of twenty of the employees in the unit repudiated the union in writing and requested the employer not to deal with it. The employer refused to bargain with the

recently certified union, and the Court of Appeals for the 6th Circuit refused to enforce the Board's order to bargain stating (at p. 930-31):

> "We cannot see how it can reasonably be said in this case that the employees are bound to be represented by the discredited union. The revocations were valid, and, hence, the Board did not sustain its burden of proving that respondent had refused to bargain with the union that represented the majority of the employees. . . . They are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through the representative of their choice."

The foregoing is in striking contrast with the decision of the Court in the instant case, where it was stated that the certification must be respected by the employer unless and until the Board itself rescinds it, and the employees are thereby forced to bargain through a representative they have long since repudiated.

The *Aldora* case decided by the Court of Appeals for the 5th Circuit on June 6, 1952, involved a contempt citation against Aldora Mills, by reason of refusal to bargain. Aldora Mills alleged that it had been advised by its employees that the union did not represent them and that the company should not recognize the union as bargaining agent. The union had been last certified in 1946. The Board took the position that under the present *Sansom* case regardless of the loss of majority, the company was

bound to continue to bargain with the union. The Court stated:

> "In view of the facts shown in respondent's answer and not denied by the Board, that the certification was made in 1946, nearly six years ago, and that the present employees do not want the union to represent them, and of the Board's persistence in refusing to take any steps by either decertification proceedings or otherwise to give the present employees an opportunity to select their own representative, we are in no doubt that no probable cause has been shown for the belief that respondent has contumaciously refused to bargain in good faith or that a further inquiry into the charge of contempt would be justified.
>
> "As to our case of NLRB v. Sanson Hosiery Mills (slip opinion April 10, 1952), on which the Board relies, it is sufficient to say that it was an enforcement, not a contempt proceeding, and that what was said and held there was intended to apply, and did apply, only to the facts of the proceeding for enforcement then under review."

It is submitted that the purported distinction between the present case and the *Aldora* case made by the Court below is without legal significance. The fact that the *Aldora* case was for violation of a Court order to bargain and the present proceeding is for violation of a statutory requirement of bargaining can scarcely justify the difference in result between the *Aldora* case and the present one. In the *Aldora* case the Court refused to find the mill in contempt and in the present case it reached the opposite result on an enforcement petition. In both cases the union

had clearly lost its majority. In both cases certification was five or more years old. In both cases the Board had failed to act upon the several decertification petitions to give the present employees an opportunity to select their own representative.

CONCLUSION

WHEREFORE, it is submitted that this Court should grant a Writ of Certiorari to the Court of Appeals for the 5th Circuit, and that the judgment of the Court below be reversed.

Respectfully submitted,

GEORGE M. ETHRIDGE,
Attorney for Petitioner,
Meridian, Miss.

Of Counsel:
GEOFFREY J. CUNNIFF,
EMANUEL G. WEISS,
Philadelphia, Pa.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
Argument	7
Conclusion	15
Appendix	16

CITATIONS

CASES:

American Steel Foundries, 85 NLRB 19	9
Artcraft Hosiery Co., Meridian Division, 73 NLRB 808, 71 NLRB 1474	2
Fay v. *Douds*, 172 F. 2d 720	11
Filtrol Corp., 74 NLRB 1307	10
Iob v. *Los Angeles Brewing Co.*, 183 F. 2d 398	11
National Labor Relations Board v. *Aldora Mills*, 197 F. 2d 265	15
National Labor Relations Board v. *Geraldine Novelty Co.*, 173 F. 2d 14	9, 10, 12
National Labor Relations Board v. *Grace Co.*, 184 F. 2d 126	11
National Labor Relations Board v. *Gullett Gin Co.*, 340 U. S. 361	12
National Labor Relations Board v. *Mexia Textile Mills*, 339 U. S. 563	13
National Labor Relations Board v. *Public Service Co-or. Transport*, 177 F. 2d 119	11
National Labor Relations Board v. *Vulcan Forging Company*, 188 F. 2d 927	15
Puritan Ice Co., 74 NLRB 1311	10
Reed Roller Bit Co., 72 NLRB 927	9
Sanson Hosiery Mills, Inc., 84 NLRB 654	5
Tyrrell v. *District of Columbia*, 243 U. S. 1	8

Page

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*):

Section 7 16
Section 8(a)(5) 16
Section 8(d)(2) 11
Section 8(d)(3) 11
Section 8(d)(4) 11
Section 9(a) 17
Section 9(c)(1) 4, 17
Section 9(c)(1)(A) 17
Section 9(c)(1)(B) 18
Section 9(c)(3) 18
Pub. Law 189, 82nd Cong., 1st Sess. 13

MISCELLANEOUS:

H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 50 11
S. Rep. No. 105, 80th Cong., 1st Sess., 10, 11, 25 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 243

SANSON HOSIERY MILLS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 98-102) is reported at 195 F. 2d 350. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 70-94) are reported at 92 NLRB 1102. The Board's decision in a prior related representation proceeding is reported at 84 NLRB 654.

JURISDICTION

The judgment of the court below was entered on April 10, 1952 (R. 102-103), and a petition for re-

hearing was denied on May 10, 1952 (R. 111). The petition for a writ of certiorari was filed on July 31, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10(e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, infra. pp. 16-18.

QUESTION PRESENTED

Whether the Board properly found that the Union retained its status as exclusive bargaining representative at the time petitioner refused to bargain with it.

STATEMENT

As a result of a petition for certification of representatives filed by the United Textile Workers of America, AFL, herein called the Union, the Board on January 9, 1947, directed that an election be held among the employees of petitioner in a unit consisting of its production and maintenance employees.[1] The election, held on

[1] *Artcraft Hosiery Company, Meridian Division*, 73 NLRB 808, 71 NLRB 1474. The name of the petitioner was subsequently changed from Artcraft Hosiery Company to its present form.

February 7, 1947, was won by the Union, which was accordingly certified by the Board on May 2, 1947 (R. 70-71, 83; 7-38). Petitioner and the Union thereafter met and negotiated a collective bargaining agreement which was signed on November 19, 1947. This agreement was conventional in form, settling substantive terms of employment, but it made no provision for its duration or termination (R. 83; B. A. 3-15).

About a year after the agreement was signed, petitioner learned that a decertification petition, seeking to displace the Union as representative, was about to be filed with the Regional Office of the Board by a group of its employees. By letter dated November 17, 1948, without prior notice, petitioner advised the Union that "in view of the pendency of a decertification proceeding, the Company regards its collective bargaining agreement dated November 19, 1947, with the United Textile Workers of America, AFL, and Local Union No. 171, as terminated as of November 19, 1948" (R. 83-84; B. A. 18). On November 27, 1948, by letter, the Union's representative, Joseph Jacobs, protested this action, stating that he understood the contract to be for a term of two years and that the Union represented a majority of the employees. He demanded that petitioner recognize the Union as bargaining agent, and stated the Union's "desire to negotiate a new agreement" for improved conditions of employment. Petitioner

replied on November 29, denying any understanding that the agreement was for a two-year period, and concluding that "With respect to your request for a collective bargaining meeting, * * * at such time as we are advised by the National Labor Relations Board of the disposition of the pending petition, a suitable reply will be furnished you." (R. 84; B. A. 19-20.)

Meanwhile, a group of petitioner's employees had filed a decertification petition on November 19, 1948, amended on November 29, 1948, the purpose of which was to effect a rescission of the Union's authority to act as representative (G.C. Exh. 6-b). The petition was filed pursuant to Section 9 (c) (1) of the Act, which provides in part that, upon the filing of a petition "by an employee or group of employees * * * alleging that a substantial number of employees * * * assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative," the Board "shall investigate such petition" and shall notice it for hearing "if it has reasonable cause to believe that a question of representation affecting commerce exists." Thereafter, if "the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

On June 28, 1949, after hearing, the Board issued its decision dismissing the decertification petition. *Sanson Hosiery Mills, Inc.*, 84 NLRB 654. The Board found that inasmuch as the agreement between petitioner and the Union contained no provision for duration or termination, it was of *indefinite* duration, and held, in accordance with its settled rule, that the agreement barred investigation of the Union's representative status for the first two years after execution of the contract (84 NLRB at 655). Under the rule applied in this case, where an agreement of indefinite duration is entered into, the contracting union's representative status may not be challenged for a 2-year period (*ibid*). Accordingly, as the Board stated (84 NLRB at 656), "Inasmuch as the petition * * * was filed before the close of the 2-year protected period of the agreement, we find that it is barred by the contract between the Employer and the Union. Accordingly, we find that no question concerning representation exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, and we shall dismiss the petition." In reaching this conclusion, the Board found "no reason to depart" from the 2-year rule applicable to agreements of indefinite duration, "even though the Employer has unilaterally attempted to terminate the agreement"; nor was it controlling "that the Em-

ployer's action herein may have created some uncertainty as to the legal effect of the contract at the present time and possibly unsettled industrial relationships in this plant" (84 NLRB at 655).

After the Board's dismissal of the petition, the Union, on July 2, 1949, sought to resume collective bargaining negotiations with petitioner (R. 85; B.A. 20-21). On July 13, 1949, continuing its refusal to treat with the Union, petitioner expressed its doubt that the Union represented a majority of its employees, and refused to meet and negotiate with the Union until the bargaining status of the Union had been established by the Board and the courts (R. 85; B.A. 22). Thereafter on July 28, 1949, the Union filed a charge with the Board, and on March 13, 1950, a complaint was issued alleging that by its refusal to bargain petitioner had violated Section 8 (a) (5) and (1) of the Act (R. 85; 39-42). In the complaint case, reaffirming its decision in the decertification proceeding, the Board held that entry into the agreement of indefinite duration fixed the Union's representative status for a 2-year period, and that during this period in which "no question concerning representation might validly be raised, the [petitioner] was under an obligation to recognize and bargain with the Union" (R. 72). The Board rejected the contention, made for the first time in the unfair labor practice proceeding, that the exchange of correspondence between peti-

tioner and the Union in November 1948 effected a termination of the agreement by mutual assent (R. 72). Holding that no such mutual termination had taken place, and that the Union's representative status was not open to challenge at the time the refusal to bargain occurred, the Board concluded that petitioner failed in its obligation to bargain, in violation of Section 8(a)(5) and (1) of the Act (R. 72-73). The Board entered an order requiring petitioner to bargain with the Union (R. 75-76).

The court below, in an unanimous decision, enforced the Board's order in full (R. 98-102).

ARGUMENT

1. There is nothing in the record to substantiate the claim, upon which petitioner predicates each of the questions it presents, that the Union had lost its majority at the time of the refusal to bargain (Pet. for Cert., pp. 6, 7, n. 1). As the court below stated (R. 102), "when on November 17, 1948, [petitioner] refused to further deal with the Union, there was no proof, but only assertion by the employer, that the Union had lost its majority."[2] Accordingly, the factual prerequisite

[2] The decertification petition filed by a group of employees alleged that over sixty percent of the employees supported it (G. C. Exh. No. 6-b). Nothing in the record authenticates this figure. Petitioner erroneously states that the decertification petition was "signed by a large majority of Petitioner's employees" (Pet. for Cert., p. 11). An examination of the

claimed by petitioner for the questions presented is absent. Consideration of questions which do not arise on the record is inappropriate. *Tyrrell* v. *District of Columbia,* 243 U.S. 1.

2. On the assumption that the Union did sustain a loss of majority, the Board properly found that petitioner's refusal to bargain with it was nevertheless not justified. The refusal was unjustified because, under the "contract bar" rules evolved by the Board for fixing the period appropriate for a redetermination of the representative status of a contracting union, petitioner questioned the Union's majority at a time when its status was not subject to redetermination.

In order that the objectives of a collective bargaining agreement entered into by an employer

---

petition (G. C. Exh. 6-b) shows, however, that it was signed by only three employees; that the unit was alleged to contain 118 employees; and that as to these other employees the petition stated only that "Over 60% with others promised to sign when seen."

The Trial Examiner stated that the "General Counsel concedes it [the decertification petition] was supported by a majority of employees" (R. 90). But the concession of the General Counsel's representative to which the Trial Examiner referred was contained only in an offer to prove that any loss of majority was attributable to unfair labor practices, an offer which the Trial Examiner rejected (B.A. 1-2). Thus, in the context of the issues as framed, there was no proof or concession of loss of majority. If petitioner relies on this offer of proof to show a loss of majority, it must withdraw the statement in its petition that "There is no claim . . . in the record of this case that Petitioner in any manner caused the loss of the union's majority" (Pet. for Cert., p. 7).

and a union may be realized, there must be a "period of stability" following execution of the agreement during which the agent may administer the agreement without challenge to its representative status. *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 16 (C.A. 2). At the same time, in order that employees may exercise the right to change representatives, it is "necessary to preserve to employees the right to challenge the representative status of an incumbent union at predictable and reasonable intervals . . . ." *American Steel Foundries*, 85 NLRB 19, 20. The Board's "contract bar" rules reconcile the dual objectives of stability and change by fixing regular intervals appropriate for a redetermination of a contracting union's representative status. These intervals are measured in relation to the duration of the collective bargaining agreement by which the union's representative status was recognized, and which made continuity of that status necessary in the interest of stability of the bargaining process. *Reed Roller Bit Co.*, 72 NLRB 927. If the agreement is for a term of two years or less, a union's representative status is normally not open to challenge until the approach of the expiration of the contract term (*Reed Roller Bit Co.*, 72 NLRB 927); if, as in this case, the agreement is for an indefinite duration or for a definite term of longer than two years, the

union's representative status is immunized for the initial 2-year period only (*Filtrol Corp.*, 74 NLRB 1307; *Puritan Ice Co.*, 74 NLRB 1311).

The Board found (*supra*, p. 5), and the court below agreed (R. 99), that the agreement entered into by petitioner and the Union on November 19, 1947, was for an indefinite duration.[3] Hence, under the "contract bar" rule applicable to such agreements, the Union was assured, in the absence of extraordinary circumstances, of a 2-year period of quiet enjoyment of its status. However, well short of the expiration of this period, petitioner refused to honor the Union's status, questioned its majority, and declined to bargain with it. If the Board's "contract bar" rules are sound, it follows that petitioner thereby failed in its obligation to bargain.

The Board's "contract bar" rules have been judicially sanctioned as "a reasonable administrative rule" (*National Labor Relations Board* v.

---

[3] Thus, statements in the petition (pp. 14, 16) that the agreement was terminable at will are contrary to the finding of the Board approved by the Court. Under "contract bar" rules, had the agreement been terminable at will, the contracting union would have acquired no protected representative status from it.

Similarly, the statement in the petition (p. 17) that the agreement had been terminated by mutual assent is contrary to the finding of the Board (*supra*, pp. 6-7), sustained by the court (R. 99). Under "contract bar" rules, had the agreement been terminated by mutual assent, the protected representative status of the Union would also have ended.

Geraldine Novelty Co., 173 F. 2d 14, 17 (C.A. 2)).[4] Furthermore, these rules were fully developed at the time the amendments to the Act were under consideration, they were well-known to Congress, and Congress manifested its approval of them in the clearest terms. S. Rep. No. 105, 80th Cong., 1st Sess., 10, 11, 25; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 50. Thus, the Senate Report, p. 11, carefully noted that the proposed amendment to Section 9 of the Act "does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate." Moreover, Section 8(d) (2), (3), and (4) of the amended Act, which prescribes procedures for modification or termination of agreements, is premised upon continuation of the Board's discretion to apply its "contract bar" rules to agreements of indefinite duration, for application of that Section to long-term or indefinite duration contracts depends on the "contract bar" rules.[5] In these circumstances, it is

---

[4] See also, *Iob* v. *Los Angeles Brewing Co.*, 183 F. 2d 398, 404 (C.A. 9); *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2); *National Labor Relations Board* v. *Grace Co.*, 184 F. 2d 126, 129 (C.A. 8); *National Labor Relations Board* v. *Public Service Co-or. Transport*, 177 F. 2d 119, 124 (C.A. 3).

[5] Thus, the procedures specified by Section 8 (d) (2), (3) and (4) "become inapplicable upon an intervening certification of the Board, under which the labor organization or

plain that after affirmative and searching inquiry into the question as a whole Congress ratified the Board's "contract bar" rules. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366.

There is, therefore, no substantial question concerning the basic validity of the Board's "contract bar" rules. Nor does petitioner seem to challenge their soundness.[6] Its sole objection on

---

individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees. * * *" This provision recognizes that, under "contract bar" rules, contracting unions, holding long-term or indefinite duration agreements, may be ousted by the Board from their status as representatives after their period of immunity has run, even though their agreement may not yet have expired.

[6] Indeed, at one point petitioner concedes that "the Board, as a matter of administrative discretion, may have had the right to refuse to entertain a decertification petition for a two-year period in the alleged interest of stability," but proceeds to argue inconsistently that there is no obligation on the employer to honor the status of the Union during the period that it may not be redetermined (Pet. for Cert., p. 15). But it is clear that the contract bar "rule should logically be applied in complaint cases no less than in representation cases." *National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F. 2d 14, 18 (C.A. 2). To authorize the employer to assert diminution in the majority support of the union in an unfair labor practice proceeding, where the identical issue would be regarded as untimely in a representation proceeding, would subvert the statutory scheme; the Act would work at cross-purposes if a holding that no question of representation may be raised in the representation proceeding did not entail a corresponding obligation to bargain enforcible in

this score rests on its misconception that the application of the rules in the circumstances of this case requires petitioner to adhere to the agreement for a two-year term, whereas under its view of the local law the agreement may be unilaterally terminated after one year, as petitioner sought to do. (Pet. for Cert., pp. 13-17.) But the Board does not hold that petitioner must observe the agreement for two years, or for any other period, before it may be terminated unilaterally on reasonable notice. The Board has in no way decided any question of substantive right or obligations which may flow from the contract. The Board holds only that, an agreement of indefinite duration having been entered into, the Union must be recognized as the bargaining representative for two years. Whether the agreement is likewise to be observed for two years is resolved not by the Board, but by negotiations between the parties or by their reference of the dispute to the state or federal courts. The sole consequence of the Board's decision is to fix the continuity of the bargaining relationship, and by eliminating the issue

---

the unfair labor practice proceeding. Cf. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 568.

References in the petition (pp. 11, 14, 15) to the amendment to Section 9 (e) of the Act in 1951 (Public Law 189, 82nd Cong., 1st Sess.) are inapposite. This amendment pertains only to the procedure by which employees may rescind the authority of their representative to enter into a union-security agreement.

of the Union's representative status for a definite and predictable period, to create a condition under which all contract disputes, including those relating to the duration of the contract, may be adjusted by the parties in any way they deem appropriate.

Hence, petitioner is mistaken in its objection that "the Board seeks to impose on Petitioner a two-year contract which was never agreed to . . ." (Pet. for Cert., p. 16). This misconception aside, petitioner does not appear to contest the soundness of the Board's decision based on its application of the "contract bar" rules to the circumstances of this case. This ground, which petitioner does not controvert on any substantial basis, fully sustains the decision below. Moreover, since petitioner does not challenge the basic correctness of the "contract bar" rules, but at best merely the propriety of their application in the peculiar circumstances of this case, the petition presents no question of general importance in the administration of the Act.

3. Petitioner attributes to the court below the holding that once a union has been certified by the Board as the exclusive representative, the union's authority to act ceases only upon the Board's formal rescission of its certification (Pet. for Cert., pp. 10-13, 17-20). The petition is directed principally to this question. However, since the decision below is fully sustained on the other bases previously described (*supra,* pp. 8-14), there is

no occasion to reach this separate issue. Furthermore, the conflict claimed by petitioner (Pet. for Cert., pp. 17-20) between the decision below and the Sixth Circuit's decision in *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927 (C.A. 6), as well as with the Fifth Circuit's later decision in *National Labor Relations Board* v. *Aldora Mills*, 197 F. 2d 265, likewise is related only to this separate issue, and is therefore immaterial for the same reason. Accordingly, the petition is based primarily upon a rationale of the court's decision which is unnecessary to support its holding and which therefore does not call for review.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
DUANE BEESON,
Attorneys,
National Labor Relations Board

September, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. * * *

* * * * *

☆U.S. GOVERNMENT PRINTING OFFICE 1953—221590/P.O.314